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No. 80-2162

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RAMAH NAVAJO SCHOOL BOARD, INC.,
AND
LEMBKE CONSTRUCTION CO., INC.,
Petitioners,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Respondents.

Motion & BRIEF *AMICUS CURIAE*
OF
ASSOCIATION ON
AMERICAN INDIAN AFFAIRS, INC.,
IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 36.3, the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, moves the Court for leave to file the attached brief *amicus curiae* in support of petitioners in the above-captioned case. The petitioners, Ramah

Navajo School Board and Lembke Construction Company, have consented to the filing of this brief; the respondent, the State of New Mexico, has refused so to consent.

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court,* 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), *Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968), and *Warren Trading Post v. Arizona State Tax Commission,* 380 U.S. 685 (1965).

The Association, moreover, historically has taken a special interest in the areas of Indian education and child welfare. In 1969 and again in 1974, for example, the Association conducted studies of the off-reservation placement of Indian children which led to the Congressional hearings that resulted in the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* See H. Rep. No. 1386, 95th Cong. 2d Sess. 9 (1978). Furthermore, the Association assisted in the presentation of information to the Congress concerning proposed legislation which ultimately became the Indian Self-Determination and

Educational Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* and the Education Amendments of 1978, 25 U.S.C. §§ 2001 *et seq.*

This case presents a question of great and continuing concern to the Association and to Indians generally throughout the United States—whether states may impose taxes in an area of Indian activity which has been preempted by a pervasive scheme of federal law and regulation. In the present case the Association is concerned with this broad issue in a specific context—namely, whether the State of New Mexico, consistent with the precedents established by the Supreme Court, may tax school construction activities in Indian country.

If the New Mexico Supreme Court's decision is not reversed, the effects on Ramah Navajos and Indians generally will be significant and deleterious. More specifically, affirmance of the decision below would seriously burden the efforts of Indian tribes to achieve self-determination in the area of Indian child welfare and education, and also would impair the attempts of the Congress and the Navajo Tribe to replace existing boarding schools with day schools located near the children's homes.

The Association submits the attached brief in order to assist the Court in recognizing that New Mexico's gross receipts tax as applied to the Ramah Navajo School is preempted by a pervasive federal statutory scheme governing Indian child welfare and education which strongly favors family and community control over Indian education. Because of the Association's deep interest in Indian child welfare and its national constituency, these points are not likely to be covered or to be approached in identical fashion in the brief submitted by petitioners Ramah Navajo School Board and Lembke

Construction Company. Accordingly, the Association requests that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of proteching the rights and improving the welfare of American Indians. The Association is the largest Indian interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists

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The Association, moreover, historically has taken a special interest in the areas of Indian education and child welfare. In 1969 and again in 1974, for example, the Association conducted studies of the off-reservation placement of Indian children which led to the Congressional hearings that resulted in the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* See H. Rep. No. 1386, 95th Cong. 2d Sess. 9 (1978). Furthermore, the Association assisted in the presentation of information to the Congress concerning proposed legislation which ultimately became the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* and the Education Amendments of 1978, 25 U.S.C. §§ 2001 *et seq.*

This case presents a question of great and continuing concern to the Association and to Indians generally throughout the United States—whether states may impose taxes in an area of Indian activity which has been preempted by a pervasive scheme of federal law and regulation. In the present case the Association is concerned with this broad issue in a specific context—

namely, whether the State of New Mexico, consistent with the precedents established by the Supreme Court, may tax school construction activities in Indian country.

If the New Mexico Supreme Court's decision is not reversed, the effects on Ramah Navajos and Indians generally will be significant and deleterious. More specifically, affirmance of the decision below would seriously burden the efforts of Indian tribes to achieve self-determination in the area of Indian child welfare and education, and also would impair the attempts of the Congress and the Navajo Tribe to replace existing boarding schools with day schools located near the children's homes.

In order to avoid needless repetition, and to facilitate the consideration of materials which otherwise might not be brought to the Court's attention, the Association has chosen to address an issue which is not likely to be discussed as extensively or in identical fashion in the brief submitted by the Ramah Navajo School Board and Lembke Construction Company. Specifically, the attached brief is submitted to assist the Court in recognizing that New Mexico's gross receipts tax as applied to the Ramah Navajo School is preempted by a pervasive federal statutory scheme governing Indian child welfare and education which strongly favors family and community control over Indian education.

STATEMENT OF THE CASE

In 1968, the State of New Mexico permanently closed the only public high school which was accessible to the children of the Ramah Navajo Chapter. The closing of that high school left the children of Ramah only one alternative, if their formal education was to continue:

attendance at one of the numerous Federal Indian boarding schools located anywhere from hundreds to thousands of miles away from home.

In an effort to prevent the separation of the Ramah Navajo children from their families and community, the Ramah Navajo Chapter organized a school board and determined to build a Chapter-managed school to replace the one closed by the State. Using funds contributed by the Navajo Tribal Council, the Ramah Chapter opened its school in the abandoned public high school building in 1970. Four years later, Congress enacted a bill appropriating monies for design and construction of the school, which was augmented by three subsequent appropriations bills. Public Law 93-245, 87 Stat. 1073; Public Law 93-404, 88 Stat. 810; Public Law 94-165, 89 Stat. 985; Public Law 95-74, 91 Stat. 293. In accordance with Congressional intentions, the funds were provided directly to the Ramah Navajo School Board for administration under a contract with the Bureau of Indian Affairs.

Only two builders submitted bids to construct the new Ramah Navajo School. The low bidder required as a condition of entering into a construction contract that the School Board reimburse the builing contractor for the full amount of all taxes. The School Board yielded to the low bidder's terms, and construction commenced.

During the course of construction, which extended over a period of years, New Mexico assessed against the building contractor a gross receipts tax which, by the date of the trial in this action, had amounted to $232,264.38. Pursuant to its contract with the building contractor, the Ramah Navajo School Board has paid the full amount of the tax. That tax is the subject of this action.

Having no other source of payment, the School Board has deducted the amount of the gross receipts tax from the total amount appropriated by Congress for design and construction of the new Ramah Navajo School. As a result, the new school is a significantly diminished version of the school originally contemplated and funded by Congress. Specifically, the school as constructed lacks certain classrooms included in the initial design and operates a cafeteria in space originally intended to house a vocational education program. The School Board also now is unable to afford certain other portions of the design, including administrative quarters and landscaping.

ARGUMENT

THE IMPOSITION OF THE GROSS RECEIPTS TAX ON CONSTRUCTION OF THE RAMAH NAVAJO SCHOOL IS PREEMPTED BY FEDERAL POLICIES CONCERNING INDIAN CHILD WELFARE AND EDUCATION.

A. Congress' Plenary Power Over Indian Affairs Preempts State Taxation Of An Indian Activity Where The Tax Burdens A Pervasive Federal Policy And The State Cannot Justify Any Such Burden.

The Indian Commerce Clause grants to Congress plenary authority over Indian affairs. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973); *United States v. Kagama,* 118 U.S. 375 (1886); *Worcester v. Georgia,* 31 U.S. 515 (1832). This broad federal power over Indian affairs, under certain circumstances, preempts the exercise of state regulatory jurisdiction over Indian tribes. *See, e.g., Central Machinery Company v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980);

and *Warren Trading Post Co. v. Arizona State Tax Comm'n,* 380 U.S. 685 (1965).

Slightly more than a year ago, this Court set forth in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), certain criteria which, if satisfied, would dictate a finding that state taxation of activities on an Indian reservation involving non-Indians has been preempted by an exercise of Congress' plenary power over Indian affairs. In that case, the Court held that federal preemption would be found where (1) federal regulation of an activity was pervasive; (2) the tax burdened the policies underlying federal regulations; and (3) the state could not justify the tax apart from its generalized interest in raising revenue.

B. Congress Has Created A Pervasive Federal Policy Regarding Indian Child Welfare and Education.

During the past fifteen years, Congress repeatedly has affirmed, with both pen and purse, a comprehensive federal policy governing the education and welfare of Indian children. As will be shown below, that policy strongly favors the preservation and stability of Indian family, community and tribal life. More specifically, federal policy seeks to insure that Indian children remain in the custody, and are educated under the supervision, of their families and communities.

Current federal policy toward the education and welfare of Indian children is rooted in Congressional hearings and legislation which began in 1967. Senate Resolution 165, adopted on August 31, 1967, authorized "a complete study of any and all matters pertaining to the education of Indian children," to be conducted by a Special Subcommittee on Indian Education.

This painstaking study, which finally was completed on November 3, 1969, concluded that our national policies for educating Indian children were "a failure of major proportions." S. Rept. 501, 91st Cong. 1st Sess. XI (1969). The Subcommittee attributed the failure in large part to the divorce of Indian education from Indian community participation and control. One of the most destructive elements of this divorce was the widespread practice of sending Indian children, at very young ages, to distant boarding schools where they would be raised without the support and identity of their families and culture.

The removal of Indian children to boarding schools was found by the Special Subcommittee to be particularly serious among the Navajo:

> As early as its first hearings in December of 1967, the Subcommittee was informed that 7,476 Navajo children, ages 9 and under, were in 48 elementary boarding schools, on the Navajo Reservation. Although there are special educational and social reasons for placing children in boarding schools, in this case it was simply a matter of not having a day school (public or Federal) available.

Id. at 67. The Subcommittee noted that the boarding schools:

> have been severely criticized as cruel and reprehensible and expert witnesses have established that they damage both the children and the Navajo family structure.

Id. at 161. Thus, Recommendation 22 of the Subcommittee was that the elementary boarding schools on the Navajo Reservation be replaced by day schools "as rapidly as possible." *Id.* at 123.

The Special Subcommittee issued some 60 recommendations covering all phases of Indian education. But these 60 recommendations were reducible to a single broad principle:

> One theme running through all our recommendations is increased Indian participation and control of their own education programs. For far too long, the Nation has paid only token heed to the notion that Indians should have a strong voice in their own destiny.

Id. at XIII-XIV. Thus, the Special Subcommittee announced a new national policy that Indian education be returned to the community, and that Indian children be returned to their homes.

The return of Indian child welfare and education to community control quickly was adopted as policy by the Nixon Administration. The following year, in a special message to Congress on Indian policy, President Nixon declared that

> Consistent with our policy that the Indian community should have the right to take over the control and operation of federally funded programs, we believe every Indian community wishing to do so should be able to control its own Indian schools.

H. Doc. 363, 91st Cong. 2d Sess. 6 (1970). In that same message, the President specifically cited the newly formed Ramah Navajo School as a "notable example" of the new policy in action. *Id.* Two years later, Commissioner of Indian Affairs Louis R. Bruce announced that, by 1976, the BIA intended to transfer at least half of all BIA schools to Indian control. L. Bruce, The Bureau of Indian Affairs 243 (1972).

Although the process of transferring Indian child welfare and education to community control had been

underway for several years, Congress gave formal sanction to that process in 1975 with the enactment of the Indian Self-Determination and Educational Assistance Act, Public Law 93-638, 88 Stat. 2206. In that Act, Congress found that "parental and community control of the educational process is of crucial importance to the Indian people." 25 U.S.C. § 450(b)(3). The Act authorized the Secretary of the Interior to enter into contracts with Indian tribes under which the tribes would assume control of education programs on the reservation. 25 U.S.C. § 450f.

Three years later, in 1978, Congress again enacted legislation to foster the return of Indian children to their communities, while encouraging the stability of Indian families. The Indian Child Welfare Act, Public Law 95-698, 92 Stat. 3069, granted to tribal courts jurisdiction exclusive of any state over Indian child custody proceedings and authorized grants to Indian tribes to conduct Indian child and family service programs. 25 U.S.C. §§ 1911.

The legislative history of that Act reflects the Congressional judgment that educational policies which remove an Indian child from his or her community have a devastating effect on Indian family and tribal life. The House Report found that the use of boarding schools on the Navajo Reservation remained a public scandal:

> The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.
>
> * * *
>
> The Federal boarding school and dormitory programs also contribute to the destruction of Indian family and community life. The Bureau of Indian Affairs (BIA), in its school census for 1971, indicates that 34,538 children live in its institutional

> facilities rather than at home. This represents more than 17 percent of the Indian school age population of federally recognized reservations and 60 percent of the children enrolled in BIA schools. On the Navajo Reservation, about 20,000 children or 90 percent of the BIA school population in grades K-12, live at boarding schools.

H. Rep. 1386, 95th Cong. 1st Sess. 9 (1978). In an effort to bring an end to the wholesale institutionalization of Indian children, Congress ordered the Secretary of the Interior to prepare a report on the feasibility of providing all Indian children with schools located near their homes and to submit the report to Congress no later than November 8, 1980, 25 U.S.C. § 1961(b).

The Congressional call for the use of day schools rather than boarding schools was echoed by the BIA. On February 2, 1977, a BIA official told the House Subcommittee on Elementary, Secondary and Vocational Education that "Current Bureau of Indian Affairs policies require day school attendance if the student can be reached by bus regardless of the circumstances." Indian Education, Hearings Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee on Education and Labor, 95th Cong. 1st Sess. 96 (1977) (Statement of Mr. Larry D. Holman).

Congress took yet another step toward the restoration of Indian child welfare and education to family and community control with the passage of The Education Amendments of 1978, Public Law 95-561, 93 Stat. 2321. Section 1130 of that Act once again committed the federal government to a policy of Indian control, stating that

> It shall be the policy of the Bureau, in carrying out the functions of the Bureau, to facilitate Indian

> control of Indian affairs in all matters relating to education.

25 U.S.C. § 2010. The Amendments also required the Secretary of the Interior to adopt, by November 1, 1979, a statement of policies which would serve as "the foundation for future Bureau actions in education." 25 U.S.C. § 2013.

The Secretary published the final language of the Congressionally mandated regulations on October 2, 1979. These policies, which were codified at 25 C.F.R. Part 31a, reflect the federal government's continuing commitment to family and community participation in Indian child education. For example, Section 31a(e) requires that the Assistant Secretary for Indian Affairs

> Promote, respect and defend the cohesiveness and integrity of the family, and Tribal and Alaska Native community, as they relate to the educational and social prerogatives of the Tribes and Alaska Native entities.

Similarly, Section 31a(i) provides that the Assistant Secretary shall

> Afford Indian and Alaska Native students the opportunity to attend local day schools and other schools of choice and the option to attend boarding schools when the student and parent or guardian determine it is in the student's best interest and consistent with the Indian Child Welfare Act of 1978. . . .

Congress has continued to mandate adherence to its policy of family and community control over Indian education, particularly with regard to boarding schools on the Navajo Reservation. In its report on the Department of the Interior and Related Agencies Appropriations Bill for Fiscal Year 1981, the House Committee on

Appropriations directed the BIA to develop a plan to curtail the use of boarding schools on the Navajo Reservation:

> The Committee is concerned about the continual movement of Navajo Indian children over long distances for education at boarding schools and the impact this has on families and communities involved. Because of this concern, the Committee directs the Secretary of the Interior to deliver within 120 days a plan showing the cost to develop a system of K-8 day schools within fixed boundaries on the Navajo Reservation. The 9-12 schools, served by these elementary schools, shall also be identified within fixed enrollment boundaries. . . . In the interim, the Committee hereby directs that no additional funds will be provided for the expansion or replacement of boarding schools and dormitories beyond the fiscal year 1981 budget. . . .

H. Rept. 1147, 96th Cong. 2d Sess. 43 (1980). The House Committee on Appropriations reaffirmed its position in its report on the Department of the Interior and Related Agencies Appropriations Bill for Fiscal Year 1982. H. Rept. 163, 97th Cong. 1st Sess. (1981).

The entire corpus of relevant federal statutes, regulations, and appropriations during the past fifteen years evidences a consistent and pervasive policy in favor of preserving Indian family, community and tribal life. In accordance with that policy, Congress steadfastly has sought to insure that Indian children are educated in day schools under the supervision of their families and communities, not in distant boarding schools.

C. Congress' Pervasive Federal Policy Regarding Indian Child Welfare And Education Preempts The New Mexico Gross Receipts Tax As Applied To The Ramah Navajo School.

Unquestionably, the federal statutes and regulations outlined above preempt the application of New Mexico's gross receipts tax to the construction of the Ramah Navajo School. These statutes and regulations create a pervasive federal policy to promote the stabilty of Indian families and tribes by insuring Indian control over and participation in Indian education and, more particularly, by providing for the education of Indian children in day schools located near their homes.

The decision by the State of New Mexico to close its public high school in the Ramah Navajo Chapter dealt a painful blow to this federal Indian child welfare and education policy. Initially, New Mexico's decision appeared to necessitate that the Ramah Navajo children be sent off to distant boarding schools—a practice which has been especially notorious and destructive on the Navajo Reservation.

Fully in accordance with federal policy, however, the Ramah Navajo Chapter undertook to finance and build a community operated day school which would permit their children to continue their education under the supervision of their parents and community. In further pursuit of the federal policy, Congress on four separate occasions enacted legislation to fund the Ramah Navajo School. As already noted, the Ramah Navajo School since its funding has been regarded as a leading example of the federal Indian child welfare and education policy in successful operation.

The gross receipts tax imposed by the State of New Mexico burdens and obstructs the federal policy of educating Indian children in day schools under the watchful eye of family and community. Already the tax has resulted in the availability of fewer classrooms, the loss of space for a vocational education program, and reductions in funds for school administration. The State of New Mexico, not satisfied with having created an educational crisis in the Ramah Navajo district, now seeks to cripple the federal and tribal solution to that crisis.

Moreover,

> This is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations. . . .

White Mountain Apache Tribe v. Bracker, 448 U.S. at 150. The Court's observation in *White Mountain Apache Tribe* applies with even greater force here. New Mexico's gross receipts tax is not justified by a particular service rendered by the state on behalf of the Ramah Navajo School Board. Indeed, it is precisely because New Mexico *refuses to provide services* for the Ramah Navajo children that the Chapter school is necessary.

New Mexico's gross receipts tax, then, satisfies all of the requirements of preemption established by *White Mountain Apache Tribe*: (1) the existence of a pervasive federal policy; (2) a state tax which burdens that policy; and (3) the absence of a justification for the tax other

than a general interest in raising revenue. In the words of this Court,

> Where, as here, the Federal Government has undertaken comprehensive regulation . . . where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.

448 U.S. at 151.

CONCLUSION

In a scant fifteen years since the Senate Special Subcommittee issued its report on Indian Education, Congress has enacted three major pieces of legislation involving Indian child welfare and education policy. This new policy—which literally has revolutionized Indian education—demands that Indian children be educated under the supervision of their families and community, rather than in distant boarding schools.

Ironically, even as the Special Subcommittee was calling for a national commitment on the scale of the Marshall Plan to rebuild the Indian education program, the State of New Mexico was abandoning its commitment to the Ramah Navajo children. Those children, however, fared much better than the 90 percent of their brothers and sisters who wound up in Indian boarding schools. Pursuant to the new federal policy, Congress agreed to fund a community controlled school at Ramah Navajo Chapter.

New Mexico now has imposed a gross receipts tax on the construction of the school at Ramah. If the tax is allowed to stand, the Ramah Navajo School will be sig-

nificantly smaller both in size and in curriculum than the school funded by Congress. New Mexico imposed this tax in pursuit of no legitimate regulatory objective and only months after eliminating public secondary education in the Ramah Navajo Chapter. Such an exercise of the state taxing power is constitutionally impermissible.

Respectfully submitted,

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